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NO JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT COHEN, individually	)	Case No. SACV 15-01698 DDP (DFMx)
and on behalf of all others	)	
similarly situated,	)	<b>ORDER GRANTING IN PART</b>
	)	<b>DEFENDANTS' MOTION TO DISMISS OR</b>
Plaintiff,	)	<b>STAY</b>
	)	
v.	)	[Dkt. No. 29]
	)	
FOOTHILL/EASTERN	)	
TRANSPORTATION CORRIDOR	)	
AGENCY; SAN JOAQUIN HILLS	)	
TRANSPORTATION AGENCY; 3M	)	
COMPANY; BRIC-TPS LLC,	)	
	)	
Defendants.	)	
_____	)	

Presently before the Court is Defendants' Motion to Dismiss or, Alternatively, to Stay Action Pending Resolution of Spokeo by U.S. Supreme Court. (Dkt. No. 29.) Based on the parties' submissions and after hearing oral argument, the Court adopts the following Order.

**I. BACKGROUND**

This putative class action case arises based on an alleged violation of the Fair Credit Reporting Act ("FCRA") as modified by the Fair and Accurate Credit Transaction Act ("FACTA"), 15 U.S.C. § 1681 et seq. (Compl., dkt. no. 1.) These statutes are designed to

1 prevent identity theft and fraud on consumers. (Id. ¶ 23.)  
2 FACTA's amendments passed on December 4, 2003, and came into force  
3 on December 4, 2006. (Id.) At issue here is 15 U.S.C. §  
4 1681c(g)(1), which requires truncation of credit and debit card  
5 numbers on receipts provided to cardholders at the point of sale or  
6 transaction. (See Compl. ¶ 24.) No more than the last five digits  
7 of the card number can be printed, and the receipts may not include  
8 the card's expiry date. (See id.) Plaintiff cites 15 U.S.C. §  
9 1681n(a) for supporting his allegation that statutory damages,  
10 punitive damages, and attorneys' fees and costs are available to  
11 consumers who prove a willful violation of FACTA's requirements.

12 Defendants here are operators of toll roads in Orange County,  
13 California. (Compl. ¶¶ 1-2.) Defendants Foothill/Eastern  
14 Transportation Corridor Agency and San Joaquin Hills Transportation  
15 Corridor Agency are governmental entities created by communities in  
16 Orange County to operate toll roads in that area (collectively,  
17 they are referred to as the Transportation Corridor Agencies, or  
18 "TCAs"). (Id. ¶¶ 1-2, 19.) Defendants 3M Company and BriC-TPS LLC  
19 are, Plaintiff alleges, independent contractors of the TCAs who  
20 perform administrative functions. (Id.)

21 Plaintiff claims that the TCAs created and operate "the  
22 largest network of toll roads in the state of California," covering  
23 fifty-one miles of roadway "used by an estimated 250,000 drivers  
24 every day." (Id. ¶¶ 6, 36-37.) Defendant 3M was the original  
25 contractor that administered the toll roads – including payment  
26 processing – but Plaintiff alleges that 3M's contract expired on  
27 June 30, 2015. (Id. ¶¶ 7, 20, 38-39, 41.) Plaintiff claims that  
28 an amendment to the license agreement allows the TCAs to continue

1 using 3M's software to administer the toll roads. (Id.) Plaintiff  
2 alleges that Defendant BRiC-TPS serves as interim contractor now  
3 and was a subcontractor of 3M in operating the toll systems. (Id.  
4 ¶¶ 8, 21, 39-40.) Defendants operate the toll roads using an  
5 electronic tolling system that is a no-cash system since May 2014;  
6 prior to that, Plaintiff claims that "drivers predominately paid  
7 with their credit or debit cards." (Id. ¶¶ 9, 44.) Convenience  
8 fees are charged at authorized merchants who can process toll  
9 payments with cash, such fees potentially being higher than the  
10 toll charged. (Id. ¶ 45.)

11 Plaintiff alleges that on August 11, 2015, he drove on toll  
12 roads administered by Defendants and incurred a toll of \$1.94.  
13 (Id. ¶ 48-49.) Plaintiff paid the toll at a "Toll Roads Service  
14 Center" with his debit card because no cash payment was allowed at  
15 the Service Center. (Id.) Plaintiff claims that he "received an  
16 electronically printed receipt from The Toll Roads that detailed  
17 his payment and included the first four and the last four digits of  
18 his Visa debit card." (Id. ¶ 50 (citing Ex. F (redacted receipt))  
19 (emphasis omitted).) On August 25, 2015, Plaintiff claims he sent  
20 a letter to some of the Defendants "notifying them of their  
21 violation of FACTA in providing his electronically printed receipt  
22 for his toll payment, as identified by The Toll Roads on August 11,  
23 2015, by disclosing more than the last five digits of his debit  
24 card number." (Id. ¶ 51.) Plaintiff alleges that Defendants never  
25 responded to the letter. (Id.)

26 Plaintiff claims that Defendants were on notice of FACTA's  
27 requirements to truncate all but the last five digits of credit and  
28 debit card numbers on electronically printed receipts. (Id. ¶ 52.)

1 Plaintiff alleges the violations were done "willfully, knowingly,  
2 or recklessly" and that Defendants "knew, should have known, and/or  
3 were reckless in not knowing about the requirement to truncate  
4 customers' credit and debit card numbers." (*Id.* ¶ 69-70.)  
5 According to Plaintiff, "[b]ecause Defendants violated FACTA by  
6 disclosing more than the last five digits of Plaintiff's debit card  
7 number, Plaintiff is subject to an increased risk of identity theft  
8 and fraud." (*Id.* ¶¶ 53, 72.) This is the source of Plaintiff's  
9 damages. (*Id.* ¶¶ 54, 73.)

## 10 **II. LEGAL STANDARDS**

### 11 **A. Motion to Dismiss**

12 A 12(b)(6) motion to dismiss requires a court to determine the  
13 sufficiency of the plaintiff's complaint and whether it contains a  
14 "short and plain statement of the claim showing that the pleader is  
15 entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule  
16 12(b)(6), a court must (1) construe the complaint in the light most  
17 favorable to the plaintiff, and (2) accept all well-pleaded factual  
18 allegations as true, as well as all reasonable inferences to be  
19 drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d  
20 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d 1187  
21 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.  
22 1998).

23 In order to survive a 12(b)(6) motion to dismiss, the  
24 complaint must "contain sufficient factual matter, accepted as  
25 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl.*  
26 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However,  
27 "[t]hreadbare recitals of the elements of a cause of action,  
28

1 supported by mere conclusory statements, do not suffice." Id. at  
2 678. Dismissal is proper if the complaint "lacks a cognizable  
3 legal theory or sufficient facts to support a cognizable legal  
4 theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,  
5 1104 (9th Cir. 2008); see also Twombly, 550 U.S. at 561-63  
6 (dismissal for failure to state a claim does not require the  
7 appearance, beyond a doubt, that the plaintiff can prove "no set of  
8 facts" in support of its claim that would entitle it to relief).

9 A complaint does not suffice "if it tenders 'naked  
10 assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556  
11 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has  
12 facial plausibility when the plaintiff pleads factual content that  
13 allows the court to draw the reasonable inference that the  
14 defendant is liable for the misconduct alleged." Id. The Court  
15 need not accept as true "legal conclusions merely because they are  
16 cast in the form of factual allegations." Warren v. Fox Family  
17 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

18 On a Rule 12(b)(1) motion to dismiss for lack of subject  
19 matter jurisdiction, the party asserting jurisdiction bears the  
20 burden of proof that jurisdiction exists. Sopak v. Northern  
21 Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995). A  
22 motion under Rule 12(b)(1) may challenge the court's jurisdiction  
23 facially, based on the legal sufficiency of the claim, or  
24 factually, based on the legal sufficiency of the jurisdictional  
25 facts. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)(citing 2  
26 James Wm. Moore et al., Moore's Federal Practice 12.30[4], at  
27 12-38 to 12-41 (3d ed.1999)). Where the motion attacks the  
28 complaint on its face, the court considers the complaint's

1 allegations to be true, and draws all reasonable inferences in the  
2 plaintiff's favor. Doe v. Holy See, 557 F.3d 1066, 1073 (9th Cir.  
3 2009). Article III standing is a matter of subject matter  
4 jurisdiction that is the burden of the party invoking federal  
5 jurisdiction to establish. DaimlerChrysler Corp. v. Cuno, 547 U.S.  
6 332, 441-42 (2006).

7 **B. Motion to Stay**

8 "A trial court may, with propriety, find it is efficient for  
9 its own docket and the fairest course for the parties to enter a  
10 stay of an action before it, pending resolution of independent  
11 proceedings which bear upon the case. This rule applies whether  
12 the separate proceedings are judicial, administrative, or arbitral  
13 in character, and does not require that the issues in such  
14 proceedings are necessarily controlling of the action before the  
15 court." Leyva v. Certified Grocers of Cal., Inc., 593 F.2d 857,  
16 863 (9th Cir. 1979); see also Landis v. North American Co., 299  
17 U.S. 248, 254-255 (1936).

18 Where a stay may prejudice the opposing party, the party  
19 seeking a stay must show that the denial of a stay will result in  
20 some hardship. Landis, 299 U.S. at 255. The court must weigh  
21 competing interests, including "the possible damage which may  
22 result from the granting of a stay, the hardship or inequity which  
23 a party may suffer in being required to go forward, and the orderly  
24 course of justice measured in terms of the simplifying or  
25 complicating of issues, proof, and questions of law which could be  
26 expected to result from a stay." CMAX, Inc. v. Hall, 300 F.2d 265,  
27 268 (9th Cir. 1962).

28 ///

1 **III. ANALYSIS**

2 Defendants raise three main arguments in support of their  
3 motion to dismiss or stay: (1) Plaintiff lacks Article III standing  
4 to sue; (2) the complaint does not sufficiently plead a willful  
5 violation of FACTA; and (3) the Court should stay the case because  
6 the Supreme Court is reviewing the question of statutory standing  
7 from another FCRA case in Spokeo, Inc. v. Robins, No. 13-1339.  
8 (Mot. Dismiss at 1-2.) Plaintiff responds that he did allege  
9 actual injury as well as a statutory violation in order to satisfy  
10 the standing requirement. (Opp'n at 3-5.) Further, Plaintiff  
11 argues the complaint does allege facts supporting Plaintiff's claim  
12 that Defendants' violation of FACTA was willful. (Id. at 1-3.)  
13 Lastly, Plaintiff argues the Court should not grant the stay  
14 because it is speculative whether Spokeo will impact this case and  
15 a stay would be prejudicial. (Id. 5, 20-24.)

16 **A. Willful Violation of FACTA**

17 As an initial matter, the Court finds that the complaint does  
18 plead sufficient facts to support Plaintiff's claim that Defendants  
19 willfully violated FACTA. The federal courts have a liberal  
20 pleading standard and at the motion to dismiss stage, all well-pled  
21 facts must be construed in Plaintiff's favor. See, e.g., Fontana  
22 v. Haskin, 262 F.3d 871, 876-77 (9th Cir. 2001). The complaint  
23 alleges what FACTA requires, the publicity that the FACTA  
24 requirements received, the credit card company requirements that  
25 are consistent with FACTA, and the three-year ramp up to the  
26 compliance time period – which for Defendants, Plaintiff claims,  
27 began more than a decade ago with California state law requiring  
28 credit and debit card number truncation. (See Opp'n at 13-15.)

1 The complaint also specifically alleges a knowing or reckless  
2 violation of the statute. Altogether, the facts pled are  
3 sufficient to state a claim.

4 **B. Standing and Stay**

5 Standing is a constitutional limit on the power of federal  
6 courts to hear cases that is derived from Article III's case or  
7 controversy requirement. See Lujan v. Defenders of Wildlife, 504  
8 U.S. 555, 560 (1992). As the Supreme Court elucidated in Lujan and  
9 other cases, there are three elements to the constitutional  
10 requirement:

11 First, the plaintiff must have suffered an "injury in fact"  
12 – an invasion of a legally protected interest which is (a)  
13 concrete and particularized, and (b) "actual or imminent,  
14 not 'conjectural' or 'hypothetical.'" Second, there must  
15 be a causal connection between the injury and the conduct  
16 complained of – the injury has to be "fairly . . .  
trace[able] to the challenged action of the defendant, and  
not . . . th[e] result [of] the independent action of some  
third party not before the court." Third, it must be  
"likely," as opposed to merely "speculative," that the  
injury will be "redressed by a favorable decision."

17 Id. at 560-61 (alterations in original) (footnote and citations  
18 omitted). At issue here is the "injury in fact" requirement.

19 Defendants argue that there is no actual injury here because  
20 Plaintiff is only alleging that Defendants violated a statute.

21 (Mot. Dismiss at 2-5.) Further, Defendants argue that at most,  
22 Plaintiff claims "in a conclusory manner that he has been exposed  
23 to a hypothetical increased risk of identity theft and fraud."

24 (Id. at 5.) Such hypothetical future injury is not sufficient for  
25 Article III standing, Defendants claim, particularly after the  
26 Supreme Court's decision in Clapper v. Amnesty International,  
27 U.S.A., 133 S. Ct. 1138 (2013). (Mot. Dismiss at 5-7.)

28 Additionally, Defendants explain that the Ninth Circuit has



1 required "at least a credible threat of harm that is real and  
2 immediate," such as when a laptop full of employees' sensitive,  
3 unencrypted information was stolen in Krottner v. Starbucks, Corp.,  
4 628 F.3d 1139 (9th Cir. 2010). This real, credible threat of harm  
5 is missing in this case, according to Defendants.

6 Plaintiff responds that not only are Defendants asking this  
7 Court to prematurely decide in favor of the position argued by the  
8 petitioner in Spokeo currently before the Supreme Court, but also  
9 Defendants ask this Court to ignore the still-binding law of the  
10 Ninth Circuit's decision in Spokeo. (Opp'n at 5-7.) Plaintiff  
11 also argues that he has suffered a real injury, cognizable because  
12 of the statute, and that Plaintiff is among those injured by  
13 Defendants' statutory violation. (Id. at 7-9.) Plaintiff claims  
14 that Defendants gave him a receipt with more card numbers on the  
15 receipt than the statute allows, thus mishandling his personal  
16 financial information and subjecting him to an increased risk of  
17 identity theft. (Id. 9-11.) According to Plaintiff, this is a  
18 real, actual injury, not just a hypothetical future harm. (Id.)

19 The question of standing in this case is strongly intertwined  
20 with Defendants' arguments regarding a stay. As Defendants admit,  
21 the Ninth Circuit's holding in Spokeo could be understood to say  
22 that a violation of a statutory right can be sufficient to satisfy  
23 the injury in fact requirement of Article III standing. See Robins  
24 v. Spokeo, Inc., 742 F.3d 409, 413-14 (9th Cir. 2014), cert.  
25 granted, 135 S. Ct. 1892 (2015). The Ninth Circuit noted that  
26 Congress can "elevat[e] to the status of legally cognizable  
27 injuries concrete, *de facto* injuries that were previously  
28 inadequate in law" – so-called statutory standing. Id. at 413

1 (quoting Lujan at 504 U.S. at 578); see also Fed. Election Comm'n  
2 v. Akins, 524 U.S. 11, 21 (1998); Bennett v. Spear, 520 U.S. 154  
3 (1997); Warth v. Seldin, 422 U.S. 490, 514 (1975); Trafficante v.  
4 Metro. Life Ins. Co., 409 U.S. 205 (1972).

5 The plaintiff in Spokeo is Thomas Robins, suing on behalf of  
6 himself and a putative class. Spokeo, 742 F.3d at 410. The  
7 defendant is Spokeo, Inc., an operator of a website that allows  
8 users to search for individuals by name, email, phone number, or  
9 address and find publically-sourced information about individuals  
10 associated with the input. Id. This information includes contact  
11 information, occupation, marital status, relatives, economic  
12 health, education attained, wealth, and other similar information.  
13 Id. Robins sued Spokeo because he asserted that Spokeo's website  
14 listed false information about him, which prevented him from  
15 getting a job and caused him psychic injuries such as anxiety and  
16 stress. Id. at 410-11. Robins alleged that Spokeo was willfully  
17 violating the FCRA by providing this false information about him.  
18 Id.

19 The Ninth Circuit saw the question before it as "whether  
20 violations of statutory rights created by the FCRA are 'concrete,  
21 *de facto* injuries' that Congress can so elevate" as to create  
22 statutory standing, and the Ninth Circuit found that violations of  
23 the FCRA are sufficient for statutory standing. Id. at 413-14.  
24 The court undertook a two-step analysis: first, "a plaintiff must  
25 be among the injured in the sense that she alleges the defendants  
26 violated *her* statutory rights" and second, "the statutory right at  
27 issue must protect against individual rather than collective harm."  
28 Id. (quoting Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702, 707

1 (6th Cir. 2009) (internal quotations omitted)). The Ninth Circuit  
2 found the plaintiff in Spokeo was alleging his own statutory rights  
3 were violated and that his "personal interests in the handling of  
4 his credit information are individualized rather than collective"  
5 harms. Id. Thus, one way of understanding the Ninth Circuit's  
6 decision in Spokeo is that the court held the plaintiff had  
7 statutory standing based on his statutory rights being violated.  
8 Another way of understanding the case, however, is that the  
9 plaintiff had alleged that he suffered actual, individual harm  
10 because he was unable to get a job based on the false information  
11 Spokeo posted about him.

12 Here, Plaintiff alleges that Defendants violated his statutory  
13 rights by providing him with an electronically printed receipt that  
14 contained more than the last five digits of his card number in  
15 violation of 15 U.S.C. § 1681c(g)(1). The statute provides for a  
16 private right of action in such cases in order to protect against  
17 individual identity theft and fraud. The private right of action  
18 provides for either actual damages or statutory damages ranging  
19 from \$100 to \$1000 per willful violation. 15 U.S.C. § 1681n.  
20 Here, Plaintiff is also alleging that he was personally injured by  
21 Defendants' actions because he is now at greater risk for identity  
22 theft and fraud, although Plaintiff does not allege his identity  
23 was stolen. Thus, Plaintiff has two potential standing arguments –  
24 a purely statutory one, and one where Plaintiff appears, like the  
25 plaintiff in Spokeo, to attempt to plead that he was actually  
26 damaged by Defendants' willful violation of the statutory  
27 requirements.

1           However, these are the exact standing questions the Supreme  
2 Court is analyzing in its review of the Ninth Circuit's decision in  
3 Spokeo. Thus, Defendants seek a stay in this action pending the  
4 Supreme Court's resolution of the standing issue in Spokeo. The  
5 case has been fully briefed and was argued on November 2, 2015.  
6 The Supreme Court is likely to make a decision sometime between now  
7 and June 2016. These facts push in favor of a stay.

8           Defendants also argue that allowing the case to go forward  
9 would cause them significant prejudice because the Court may lack  
10 subject matter jurisdiction due to the lack of standing, but  
11 Defendants would have been subjected to classwide discovery and  
12 class action certification preparation. (Mot. Dismiss at 13-14;  
13 Reply at 5-6.)

14           Plaintiff argues he would be prejudiced by a stay and that  
15 Spokeo would not control the outcome of the standing analysis here.  
16 (Opp'n at 20-24.) Further, Plaintiff claims that enforcement of  
17 FACTA must continue while the Supreme Court analyzes these standing  
18 issues. (Id.)

19           The Court finds that the prejudice to Plaintiff would be  
20 slight if a stay is granted. It is still early in the case, and  
21 with class certification and other important litigation steps still  
22 ahead, a stay now to see if the Supreme Court forecloses  
23 Plaintiff's main theory of standing would be beneficial to  
24 efficient and proper judicial functioning. Therefore, the case is  
25 stayed pending the Supreme Court's decision in Spokeo.

#### 26 **IV. CONCLUSION**

27           For all the reasons listed above, the Court GRANTS in part  
28 Defendants' Motion to Dismiss or Stay, and STAYS the action pending

1 resolution of the Spokeo case at the Supreme Court. The Court  
2 orders the parties to file a status report within ten days of the  
3 Supreme Court issuing a decision in Spokeo updating the Court on  
4 the litigation and the impact of the Spokeo decision on this case,  
5 if any.

6  
7 IT IS SO ORDERED.

8  
9 Dated: February 8, 2016



DEAN D. PREGERSON  
United States District Judge